Supreme Court, U. S.
FILED
JUN 11 1980
MICHAEL RODAK, JR., CLERK

In the Supreme Court of the United States

OCTOBER TERM,

NO. 79-1949

CHESTER KAIN,

Petitioner

versus

S.S. VJAZMA

and

THE BALTIC SHIPPING COMPANY

Respondents,

Petition for Writ of Certiorari to
the United States Court of Appeals,
Fifth Circuit

EVANGELINE M. VAVRICK
Attorney for Petitioner
Suite 200 — Nance Building
526 St. Louis Street
New Orleans, Louisiana 70130
Telephone: 524-5404

A B Letter Service, Inc., 327 Chartres St., New Orleans, La. (504) 581-5555

INDEX

PAGE

Opinions Below 2

Jurisdiction 2

Questions Presented 2

Statement of the Case 3

Reasons for Granting the Writ 8

Conclusion 14

Certificate of Service 15

Appendices A-1

Appendix A A-1

Appendix B A-10

Appendix C A-14

Appendix D A-17

CITATIONS

CASES: **PAGE**

1. *Amos Treat & Co. v. SEC.*, 113 U.S. App. D.C. 100, 306 F.2d 260, 267 (1962 11

2. *Berger v. United States*, 255 U.S. 22, 41 S.Ct. 230, 65 L.Ed. 481 (1921)..... 10

3. *Feronia Broadcasting Systems, Inc. v. R.C.A. Corporation*, 569 F.2d 251 9,12,1

4. *Fuentes v. Shevin*, 407 U.S. 67, 92 S.Ct. 1983, 32 L.Ed. 2d 556 (1972) 10

5. *In Re Murchison*, 349 U.S. 133, 75 S.Ct. 623, 99 L.Ed. 942 (1955) 10

6. *Joint Anti-Fascist Refugee Committee v. McGrath*, 341 U.S. 123, 168, 71 S. Ct. 624, 646, 95 L.Ed. 817 (1951)..... 11

7. *Offutt v. Unites*, 348 U.S 11 1475 S.Ct.11, 99 L.Ed 11 (1954) 10

8. *Tuney v. State of Ohio*, 273 U.S. 510, 47 S.Ct. 437..... 9,10

9. *Wall v. American Optometric Association*, 379.F.Supp.175 10

STATUTES: **PAGE**

Title 28, United States Code Annotated
Section 144 4,6,8

Title 28, United States Code Annotated
Section 455 a) 2,4,6, 7,8,10 11,13,14

Title 28, United States Code Annotated
Section 455 e) 4,7,8, 12,14

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1980

NO.

CHESTER KAIN,

Petitioner

versus

S.S. VJAZMA

and

THE BALTIC SHIPPING COMPANY,

Respondents

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FIFTH CIRCUIT

Petitioner, Chester Kain, respectfully petitions for writ of certiorari to review the judgment entered February 13, 1980, in the United States Court of Appeals for the Fifth Circuit, and the denial of the petition for rehearing entered on March 13, 1980.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit in *Chester Kain v. S. S. Vjazma and the Baltic Shipping Company* (Appendix C) is unreported. The opinion of the United States District Court for the Eastern District of Louisiana, which was unpublished, appears in Appendix A. The minute entry of the United States District Court for the Eastern District of Louisiana denying petitioner's motion to recuse Judge Charles Schwartz is unpublished and appears in Appendix B.

Application for rehearing was denied on March 13, 1980. (Appendix D)

JURISDICTION

The judgment of the Court of Appeals for the Fifth Circuit was entered on February 12, 1980 (Appendix C), and the petition for rehearing was denied March 13, 1980 (Appendix D). This petition was filed within ninety days thereafter. This Court's jurisdiction is invoked under 28 U.S.C.A. 1254 (1).

QUESTIONS PRESENTED

The questions presented are:

1. Does Title 28, U.S.C.A. Section 455A mandate disclosure by a trial judge of extra-judicial, personal, business, social or other contacts with parties litigants, their attorneys, witnesses and families before his court prior to commencement of trial?

2. If disclosure is mandated, is not the disclosure intended to elicit from the judge that information about himself, which the litigants would otherwise be entitled to elicit on voir dire of a juror to determine the juror's capability for rendering a fair and impartial verdict?

3. Is the objective reasonable man test standard for disqualification of a judge the equivalent of the peremptory challenge to a juror who cannot be removed for cause but before whom a litigant has a well-founded, subjective belief that fair and impartial justice will not be obtained?

4. What is the effect of a judgment rendered by a judge who had a duty to disclose personal information which would have raised a question as to his impartiality but which the judge did not disclose, and for which the judge did not obtain a waiver?

STATEMENT OF THE CASE

Chester Kain, petitioner, formerly a longshoreman, was severely injured on November 6, 1973. Suit requesting trial by jury was filed against the S. S. VJAZMA and the Baltic Shipping Company on October 16, 1974, and regularly allotted to Division "H" of the United States District Court for the Eastern District of Louisiana, Judge Lansing L. Mitchell.

From October 16, 1974, to December 7, 1976, the day before trial began, all preliminary matters, status conferences and pre-trials were conducted by Magistrate Harry Lee or the presiding Judge of Division "H", Lansing L. Mitchell.

The trial was regularly set on Judge Mitchell's trial docket for the week of December 6, 1976, along with other cases regularly assigned for that week, as is usual in Judge Mitchell's division.

On December 7, 1976, petitioner's counsel received a call from Judge Mitchell's secretary in late afternoon stating that Judge Charles A. Schwartz, Jr., recently appointed to the vacancy created by the death of Judge Herbert Christenberry, had volunteered to try petitioner's case and that the trial would commence the next day before Judge Charles A. Schwartz, Jr.

Judge Mitchell did not, however, at that time enter a minute entry transferring the case permanently to Judge Schwartz.

On December 8, 1976, the case proceeded to trial without a jury before Judge Charles A. Schwartz, Jr., who made no pre-trial disclosures.

Petitioner did not, as a result of the judge's gratuitous volunteering, request reinstatement of the jury trial nor did petitioner challenge the judge's qualifications either under Title 28, Section 144, nor Title 28, Section 455 a) and e) of the United States Code, nor did the judge make any disclosures which would have given rise to a challenge to his bias or lack of impartiality.

During the trial, the judge participated extensively in cross-examination and conducted himself generally in a manner which, to petitioner, gave a strong appearance of bias and partisanship behavior, though no underlying reason for such was readily known, as the judge gave no pre-trial indication of his personal affiliation with defense counsel.

Petitioner and three lay witnesses, all disinterested parties, testified. There was a preponderance of evidence that the accident happened as alleged. The only way to preclude judgment for the petitioner was to reject everyone's testimony. This was accomplished under the guise of "lack of credibility".

The court, by its own admission, considered less than half the evidence, rejected circumstantial evidence, corroborative evidence elicited on cross and supportive documentary evidence.

Petitioner's case was dismissed January 31, 1977. The "credibility" of the petitioner and three disinterested witnesses was allegedly the reason for the dismissal.

Appellant learned before the delays for filing for a new trial had run that Judge Schwartz, just prior to his appointment to the bench some few months before this trial, had been the law associate of William E. Wright, Jr., the son of the defense attorney, William E. Wright, for whose case the judge had volunteered.

Whether the relationship of the three parties was by blood, through or by marriage, close social or personal or a close relationship by the son with the father and

simultaneously with his law associate to the extent that he could, would or even did influence his former law associate, whose cases he was still handling, was not known as there had been no pre-trial disclosure.

On February 10, 1977, petitioner filed a motion for a new trial in Division "H" before Judge Mitchell, as the case was still being carried on the court's docket as a Division "H" case.

Among nineteen grounds set forth as basis for the new trial, five were directed specifically to violations of Title 28, Sections 455 a) and e).

On *February 16, 1977,* more than two months after the trial, Judge Mitchell entered an order transferring the case to Judge Schwartz for hearing on the motion for a new trial.

In the minute entry transferring the case, Judge Mitchell stated that Judge Schwartz had volunteered to "accommodate counsel". Since counsel for petitioner and counsel for intervenor were accommodated with a satisfactory trial date before Judge Mitchell before whom petitioner had waived trial by jury, and since neither had requested accommodation of Judge Schwartz, the accommodation was obviously an accommodation for defense counsel.

Petitioner, after learning of the relationship, filed a motion with supporting affidavits to recuse Judge Schwartz from hearing the motion for new trial alleging violations of both or either of Title 28 U.S.C.A. Section 144 or Title 28

U.S.C.A. Section 455 a) and e), as to the date of filing the motion for recusal, there had been no disclosure on the record by Judge Schwartz as to the relationship nor as to the circumstances under which he volunteered.

On April 5, 1977, Judge Schwartz referred the recusation motion to the Chief Judge Frederick J. R. Heebe for review and disposition.

On April 14, 1977, Judge Heebe ordered reallotment of the case to another section, apparently concurring in what he believed was self-recusal by Judge Schwartz.

On April 14, 1977, the case was reallotted to Judge Alvin Rubin, who made a disclosure on the record, which resulted in self-recusal and reallotment.

The case was reallotted this time to Judge Blake West, who heard the motion to recuse and ruled against recusal on an improper application of the law. Without any evidence as to the relationship between the parties, Judge West made factual findings which were totally unsupported by any evidence in the record.

After denial of the motion to recuse by Judge West, the case was referred to Judge Schwartz by Judge Blake West for hearing on the motion for a new trial. The motion for a new trial heard by Judge Schwartz was summarily denied.

Judge Schwartz, at the conclusion of the motion for a new trial, requested if, in view of the ruling on the motion for recusal by Judge Blake West, counsel for petitioner would withdraw allegations Nos. 14 through 18 in the mo-

tion for a new trial. Counsel refused, whereupon Judge Schwartz made his first disclosure upon the record in anticipation of counsel's appeal to the Fifth Circuit.

The disclosures consisted of certain self-serving statements and documents, the most important of which was a letter indicating simultaneous business contacts with his former associate, the son of defense counsel, at the time he gratuitously volunteered for his associate's father's case.

Petitioner appealed and was granted oral argument. The appellate court affirmed the judgment of the lower court and the ruling by Judge West on the motion to recuse by per curiam, and designated the opinion be unpublished.

The ruling of Judge Blake West was erroneous and, contrary to the decisions of this court, concerned itself with Section 144 of Title 28, which has been subsumed in Section 455. Section 455 a) and e) were not properly considered by Judge West. Judge West did not apply the reasonable man test and ruled that there was an absence of objective evidence as to Judge Schwartz's bias, which is a totally erroneous application of Section 455 a) and e).

REASONS FOR GRANTING WRIT

1. Petitioner was denied constitutional due process in that he did not receive a fair trial before an impartial and unbiased trier of fact.

2. The integrity of the judicial system was impuned by the judge volunteering and failing

to disclose the party being accommodated or the reason for accommodation, leaving the personal relationship to be discovered after the judgment casting great doubt and suspicion upon the quality of justice.

3. The Fifth Circuit created a conflict within the circuit as to the application of 455 a) and e) by failing to follow the objective reasonable man standard applied in *Feronia Broadcasting Systems, Inc. v. R. C. A. Corporation,* 569 F.2d 251.

A fair trial in a fair tribunal is a basic requirement of due process. Fairness of course requires an *absence of actual bias* in the trial of cases. But our system of law has always endeavored to prevent even the *probability of unfairness.* To this end, no man can be a judge in his own case and no man is permitted to try cases where he has an interest in the outcome. That interest cannot be defined with precision. *Circumstances and relationships must be considered.* This Court has said, however, that 'every procedure which would offer a possible temptation to the average man as a judge . . . not to hold the balance nice, clear, and true between the State and the accused denies the latter due process of law.' *Tumey v. State of Ohio,* 273 U.S. 510, 532, 47 S.Ct. 437, 44, 71 L.Ed. 749. *Such a stringent rule may sometimes bar trial by judges who have no actual bias and who would do their very best to weigh the scales of justice equally between*

> *contending parties.* But to perform its high function in the best way 'justice must satisfy the appearance of justice.' *Offutt v. United States,* 348 U.S. 11, 14, 75 S.Ct. 11, 13 99 L.Ed. 11."

Title 28, U.S.C.A. Section 455 a) mandates recusal in "any" situation in which the judge's impartiality might reasonably be questioned.

This Court has repeatedly stated that justice must satisfy the appearance of justice.

> *Offutt v. United States,* 348 U.S. 11, 1475 S.Ct. 11, 13, 99 L.Ed. 11 (1954). *Tumey v. Ohio,* 273 U.S. 510, 532, 47 S.Ct. 437, 71 L.Ed. 749.

> *Wall v. American Optometric Association, Inc.,* 379 F.Supp. 175 (1974):

> "It is one of the mainstays of our system of laws that a state cannot affect a person's personal or property rights except after a hearing before a fair and impartial tribunal. *Fuentes v. Shevin,* 407 U.S. 67, 92 S.Ct. 1983, 32 L.Ed. 2d 556 (1972). *In re Murchison,* 349 U.S. 133, 75 S.Ct. 623, 99 L.Ed. 942 (1955); *Berger v. United States,* 255 U.S. 22, 41 S.Ct. 230, 65 L.Ed. 481 (1921). A fair and impartial tribunal requires at least that the trier of fact be disinterested. *Tumey v. Ohio,* 273 U.S. 510, 47 S.Ct. 437, 71 L.Ed. 749 (1927), and that he also be free from any form of bias or

predisposition regarding the outcome of the case, *Pillsbury Co. v. FTC,* 354 F.2d 952 (5th Cir., 1966); *N.L.R.B. v. Phelps,* 136 F.2d 562 (5th Cir. 1943). *Not only must the procedures be fair, 'the very appearance of complete fairness'* must also be present. *Amos Treat & Co. v. SEC.* 113 U.S. App. D.C. 100, 306 F.2d 260, 267 (1962."

Winters v. Miller, 446 F.2d (1971:

"Under the constitution there is no procedural right more fundatmental than the right of the citizen, except in extraordinary circumstances, to tell his side of the story to an impartial tribunal. As Mr. Justice Frankfurter noted in his concurrence in *Joint Anti-Fascist Refugee v. McGrath,* 341 U.S. 123, 168, 71 S.Ct. 624, 646, 95 L.Ed. 817 (1951):

"This Court is not alone in recognizing that the right to be heard before being condemned to suffer grievous loss of any kind even though it may not involve the stigma and hardship of a criminal conviction, is a principle basic to our society."

Title 28, Section 455 of the United States Code states:

"Section a.
Any justice, judge, magistrate or referee in bankruptcy of the United States *shall* disqualify himself in any proceedings in which *his impartiality might be questioned.*

"Section e.
No justice, judge, magistrate or referee in bankruptcy shall accept from the parties to the proceedings a waiver of any ground for disqualification enumerated in subsection (b). Where the ground for disqualification arises only under subsection (a) waiver may be accepted provided it is preceded by a full disclosure on the record of the basis for disqualification."

The fact situation in the instant case mandated self-disqualification unless and until a waiver of the disqualification had been exercised by the parties. In the absence of both disclosure and waiver with a clear appearance of partiality to defendant, petitioner is entitled to a new trial as a matter of law.

If the aforestated relationship had been between the attorney and a juror, such a relationship would have been revealed on voir dire and the juror excused for cause and if not for cause peremptorily upon revelation of the relationship.

As judge and sole juror, Judge Schwartz had the obligation to reveal that which would have disqualified him as a juror.

The fact situation in *Feronia*, (supra), the relationship between a judge and his clerk is analogous to the fact situation here, the relationship of a judge to his former law associate. To apply the reasonable man test in *Feronia* which results in recusation and to fail to apply it in the instant case results in inconsistent application of the law and inconsistency in results.

In *Feronia*, the Fifth Circuit stated that once it "*appeared*" that an unfair advantage had been gained by the plaintiff, the trial judge had no alternative but to disqualify himself.

> *Feronia*, at Page 256:
> "...The Code of Judicial Conduct for United States judges, approved by the Judicial Conference of the United States, expresses concern that the judicial system be protected from the *appearance of impropriety* in the eyes of both the parties and the general public.
>
> "A judge should avoid impropriety and the *appearance* of impropriety in all his activities..."
>
> "A. A judge...should conduct himself at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary."

Section 455 a) liberalizes the law of disqualification to favor the moving party. It mandates pre-trial disclosure to a myriad of situations involving relationships between the judge and all participants in the specific litigation. Section 455 is clear and unequivocal that the *reasonable man test* is determinative of whether or not the judge's impartiality might reasonably be questioned.

Section 455 a) does not rest on personal bias and prejudice, nor the proof of its existence.

The legal test under Title 28, U.S.C.A. Section 455 a) is whether the charge of impartiality is grounded on facts that would create a *reasonable doubt* concerning the judge's impartiality, a doubt not in the mind of the judge himself, nor in the mind of the litigant filing the motion, but rather in the mind of a reasonable person.

The Fifth Circuit applied the reasonable man objective standard test in *Feronia* and affirmed Judge West's decision in the instant case. The result is inconsistent application of the law. Judge West required actual proof of bias which is not the test under Section 455 a) and e).

CONCLUSION

The application of fair and equal justice was indeed questionable on the basis of the judge's trial demeanor alone, but the failure of the judge, the arbiter of justice, to disclose that which he was legally obligated to disclose, undermines the integrity of the judicial system and casts a cloud of suspicion upon the quality of justice. Knowing the aforestated facts and viewing them objectively, the reasonable mind is drawn to the inescapable conclusion that petitioner was not equal in the eyes of the law and, further, that the respondent did enjoy some advantage. This inequality has resulted in depriving petitioner of his constitutionally guaranteed right to a fair and impartial trial.

Respectfully submitted,

EVANGELINE M. VAVRICK
Attorney for Petitioner
Suite 200 — Nance Building
526 St. Louis Street
New Orleans, Louisiana 70130
Telephone: (504) 524-5404

CERTIFICATE OF SERVICE

Undersigned counsel for Petitioner certifies that service of this Petition for Writ of Certiorari has been made upon counsel for respondents this date, in accordance with law, by depositing three (3) copies thereof in the United States mail, postage prepaid, to the following person:

William E. Wright
Terriberry, Carroll, Yancey & Farrell
2100 International Trade Mart Building
New Orleans, Louisiana 70130.

EVANGELINE M. VAVRICK

APPENDIX A

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

CHESTER KAIN

vs.

S/S VJAZMA

SECTION "A" (F)
NO. 74-2823

CIVIL ACTION

Plaintiff Chester Kain, a Louisiana citizen, on November 6, 1973, while in the employ of J. P. FLorio Stevedoring Company as a stevedore, was engaged in cargo operations aboard the SS VJAZMA, a Russian vessel owned by defendant Baltic Shipping Company, a Russian corporation with its principal place of business in Leningrad, Russia U.S.S.R. The complaint asserts a cause of action for negligence and jurisdiction of the court is not questioned. The case was tried to the Court without a jury on December 8, 9, and 10, 1976. After due consideration of the testimony at trial, the memoranda of counsel, the record, and the law, the Court makes the following findings of fact and conclusions of law:

To the extent that any of the following findings of fact constitute conclusions of law they are adopted as such, and to the extent that the conclusions constitute findings of fact, they are adopted as such.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

On November 6, 1976, the vessel was berthed at the Myrtle Grove Wharf south of New Orleans at a grain elevator for the purpose of loading grain. Prior to the arrival of the stevedoring crew, the vessel's crew members readied the ship for loading by swinging the booms offshore (that is, to starboard) so that they would be out of the way of the grain loading equipment and so as not to interfere with the loading of the grain into the vessel's holds. Plaintiff's stevedoring crew boarded the vessel at 0800 hours and began loading grain (corn) into the No. 3 hold. The longshoremen were to handle and operate the cargo handling gear in connection with said operation. Plaintiff'screw was working at the No. 3 hold and the crew consisted of a gang of eight. At the time of the incident hereinafter referred to the superintendent and foreman in charge of the Florio longshoremen were not aboard the vessel and the operation was being conducted under the direction of Albert S. Adams, the pusher.

At or about 1030 hours the No. 3 hold was filled with grain to the point at which it was necessary to cease loading and to place a grain trimming machine in the hold. In order to accomplish this, the pusher Adams decided to swing a boom from starboard to port by attaching the runner of the boom to a cleat on the deck of the port side, using the port after winch to put slack on the runner, and swinging the boom. The winch controls for the port after winch were located on an elevated platform at the aft end of the No. 3 hatch. Just prior to the incident hereinafter described the longshoremen in the gang decided to attach a rope to

the runner and use the line to pull the runner over from the starboard to the port side of the hatch. George Belton, a member of the gang, attempted unsuccessfully to throw a line from the port to the starboard side of the hatch. At or about the same time, Adams went to the top of the winch platform, activated the port after winch to put slack in the runner of the port after boom. The longshoremen on the deck included plaintiff Chester Kain, George Belton, John Shields and others. Plaintiff Kain took rope from Belton and stepped from the deck of the vessel up into the coaming, a distance of about three feet above the deck in order to carry or throw the line from port to the starboard side of the hatch. Shields was in the process of walking across the coaming aft of the No. 3 hatch from starboard to port to obtain the rope which had been passed from Belton to Kain. As Kain stepped forward a click-click noise was heard, the boom was activated, which in turn caused the preventer of the boom to swing and come into contact with plaintiff, causing him to lose his balance and fall into the hold some 20 to 25 feet while he fell upon the cargo of corn. The longshoremen on deck went into the hold and assisted in removing Kain from the vessel.

As a result of the accident plaintiff sustained head and neck injuries and a back injury superimposed upon a preexisting spondylolysis. On November 12, 1975, a total laminectomy at the L-5 level was performed. A bulging disc at the L-5 S-1 level bilaterally was excised and a posterior lumbar interbody arthrodesis was performed. In October of 1976 a fusion was found to be a non-fusion. Plaintiff's medical prognosis at the time of trial was that he would not be able to return to the duties of his prior occupation with or without further surgery.

The case resolves itself into primarily a question as to who or what caused the preventer chain to strike plaintiff and cause him to fall into the hold. It is uncontroverted that at the time of the accident, Albert S. Adams was on the winch deck where the controls were located. Plaintiff's version of what transpired is that one of the Russian crew members (name and identity unknown) activated the boom. Defendant's version is that there were no Russian crew members in the vicinity of the winch controls and therefore the boom must have been activated by Adams.

Plaintiff elicited testimony from the following stevedores in order to attempt to sustain his version of what transpired: Albert S. Adams, George Belton, John Shields and the plaintiff. It is to be noted that neither at the time of the incident, nor immediately thereafter, did any of the witnesses, except Adams, claim to have seen a Russian crewman in the vicinity of the winch. Thus, other than the testimony of Adams, we are left with pure speculation as to the cause of the preventer boom striking plaintiff.

The testimony of Albert S. Adams does not prove the plaintiff's claim. The Court is of the opinion that his testimony is "not credible", taking into consideration, among other things, the exhibits filed herein as to the physical conformation of the vessel, the inconsistencies contained in his deposition (Exhibit D-1), the statement he originally gave which is attached to and made a part of same, and the various statements he made at the trial. In reaching this conclusion the Court particularly notes the following: At times he testified that he saw a Russian crewman with his hands on the winch, and at other times he thought the crewman might have had his hands on the

winch controls or that he was just standing in the vicinity of same; he testified that the winch controls were four to six feet back of the forward rail and it was necessary for him to walk forward to see the deck below; however, the winch controls as shown by the sketches, photographs and diagrams in evidence demonstrate them to be partly on the rail, and varying from about four inches to less than a foot from the rail, thus when he stated he had to walk forward on the deck in order to view the scene below, he was in error; at times he indicated there was one Russian seaman in the vicinity at the time of the accident and at other times he claimed there were two; on a diagram used at the trial he positioned himself as having walked forward on the deck on which the winch controls were located to the inshore side of the platform so he could view the scene below; however a photograph introduced in evidence showed that this would be impossible as winch housings were in that area; his statement taken shortly after the accident states that a mate of the ship was raising the boom whenever he was told to; his statement at the trial is at complete variance with this; he further made a vain attempt to rehabilitate himself on this point in his deposition (Exhibit B-1); he stated during the trial that no one touched the preventer chain while on the other hand plaintiff himself stated that they were and had been working in connection with the preventer chain.

Moreover, the Court which had the opportunity to observe the demeanor of this witness, and taking into consideration such, and his response to the questions asked by the parties and the Court, is convinced that this witness was not responding with candor and was fully capable of fabricating any testimony which he believed would assist

the plaintiff in sustaining his claim and/or absolve him from having seriously injured his co-worker by placing the blame on the "phantom Russian" or "phantom Russians." In view of the lack of credibility which can be accorded this witness, it is just as likely to suppose that since Adams was the only one who we know was in the vicinity of the winch controls that he caused the accident, as it is to speculate that it was caused by some unknow Russian crewmember.[1]

The testimony of George Belton does not assist in proving plaintiff's claim as he testified he did not see anyone at the winch controls. Furthermore, the reason he gave for this fact was that the hatch covers were blocking his view of the deck upon which the controls were located. However, the sketches and pictures of the vessel show that the hatch covers when removed from the hatches were designed in such a way as to be tucked under the winch platform permitting the winch operator to have a clear and unobstructed view of the hold, other than the coaming of the hold which was directly under him. This could be seen by leaning slightly over the rail of the platform. Moreover Belton in his statement (Exhibit D-1) stated he felt the cause of the accident was that the boom shifted because of the list and he does not refer to a lowering of the boom.

---

[1] Furthermore, it is to be noted that the accident report (Exhibit D-5) which apparently was completed on the date of the accident, seeks to place the cause of the accident on the listing of the ship. However, there was no evidence introduced at the trial which would support the theory that the boom swang because of any listing of the ship.

The Court is further influenced by the fact that Adams apparently made no attempt at any time to obtain the names of the so-called "phantom Russians" and include such in a report of the incident.

John J. (Junior) Shields, another longshoreman in the gang, does not claim to have seen any Russians on the winch deck at the time of the accident and his testimony does not in any way assist plaintiff in sustaining plaintiff's burden of proof as to the cause of the accident. Taking into consideration his testimony and statement after the accident (Exhibit D-4) one can only conclude that he simply had no direct knowledge of what caused the accident.

Anthony Joseph Kain, the foreman, testified to the effect that he did not see the accident.

The testimony of the plaintiff also does not shed much light on the cause of the accident. Particularly it is to be noted that there are also material inconsistencies in his testimony. In particular during his deposition he stated that his brother Ernst Kain had gone off to get a shackle. At the trial he said his brother (although he did not see the accident) was near the hatch. He, like Belton, claims that he could not see the winch deck because of the height of the hatch covers, whereas as indicated hereinabove, this could not have been correct.

The uncontroverted evidence was to the effect that the stevedoring operation and operation of the gear was under the supervision and control of the stevedoring crew. Thus there would be no reason for a Russian crew member to activate the winches. Nor is there any evidence whatsoever in the record that the stevedoring crew had asked the assistance of the Russian crew members. Thus, in the absence of any direct evidence that a Russian crew member activated the winches and lowered the boom or caused the boom to move in any manner, it would be pure conjecture and speculation to assume that such was the cause of the

accident. The only evidence which would tend to connect the Russian crew member with the accident was the inconsistent and unreliable testimony of Adams. Thus, the Court concludes that plaintiff has failed to sustain the burden of proving by a fair preponderance of the evidence that he sustained an accident due to the defendant's negligence.[2]

Plaintiff's post trial memorandum urges the Court to take judicial cognizance of the fact that the Russians who testified should not be believed because, "they are products of a Communist country, a Communist mentality, these individuals live for the state, they live a lie to survive daily . . . ." That this Court "should take judicial notice of the fact that the Russians have no regard for the truth, nor for the principles of democracy, nor for courts of justice where one has recourse." Further, "and it is suggested that this Court should also take judicial notice of the facts — they are diabolical, propensity for lying, not only to the world but to the Russian people."

In this case it is unneccessary for the Court to indulge in such ideological and philosophical theories in order to resolve the issue before it. It is abundantly clear from the reasons set out hereinabove that this Court has been able to reach its conclusions in this case (except insofar as pertains to the physical layout of the vessel which is supported by the exhibits filed in the record) without having to

---

[2] Although the Court is of the opinion that plaintiff himself was guilty of negligence, it is not necessary to dwell on this in view of his failure to show negligence on the part of the defendant.

take into consideration the testimony of the Russian crewmen. The testimony of plaintiff's witnesses standing alone unrebutted, and without any denial by the Russians' witnesses, are not sufficient to convince this Court that plaintiff has demonstrated by a preponderance of the evidence that the cause of the accident was due to any negligence on the part of the defendant, despite plaintiff's obligation to produce such evidence.

Mere speculation or mere possibility and even unsupported probability is not sufficient to support a judgment in plaintiff's favor. *Pennsylvania R. Co. v. Chamberlain*, 288 U.S. 333, 53 S. Ct. 391 (1933); *Shapleigh v. United Farms*, 100 F.2d 287 (5th Cir. 1938); *Dreijer v. Girod Motor Co.*, 294 F.2d 549 (5th Cir. 1961). The burden of proving negligence on the part of a shipowner rests entirely upon the plaintiff. *McQuiston v. Freighters and Tankers Steamship Company*, 217 F.2d 746 (5th Cir. 1964).

Since the Court does not find that the plaintiff has demonstrated negligence on the part of the officers or members of the crew of the M/S VJAZMA, causing plaintiff's injuries, the complaint is dismissed at plaintiff's cost. The Clerk of Court is hereby directed to enter judgment in accordance with this Opinion.

New Orleans, Louisiana, this 24th day of January, 1977.

UNITED STATES DISTRICT JUDGE

APPENDIX B

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

CIVIL ACTION

NO. 74-2823

SECTION "F" (A)

CHESTER KAIN

Appellee,

versus

SS VJAZMA, ET AL

Appellant.

ORDER AND SUPPORTING REASONS

Movant, an unsuccessful and unhappy longshoreman-plaintiff, seeks a new trial of his claim against defendant shipowner through the filing of a motion seeking to have the trial judge recuse himself. The case was allotted to the trial judge the day prior to trial, when the judge to whom it originally was allotted was unable to conduct the trial because of the crowded condition of his docket. The parties agreed to waive trial by jury.

The motion alleges two grounds for recusal:

(1) The trial judge was biased and prejudiced in favor of defense counsel and/or defendants;

(2) The trial judge did not disclose the nature and extent of his relationship to defense counsel.

For the reasons which follow, the motion to recuse is DENIED.

REASONS

(1) Bias and prejudice.

28 U.S.C. §144 provides as follows:

> "Whenever a party to any proceeding in a district court makes and files a timely and sufficient affidavit that the judge before whom the matter is pending has a personal bias or prejudice either against him or in favor of any adverse party, such judge shall proceed no further therein, but another judge shall be assigned to hear such proceeding.
>
> "The affidavit shall state the facts and the reasons for the belief that bias or prejudice exists, and shall be filed not less than ten days before the beginning of the term at which the proceeding is to be heard, or good cause shall be shown for failure to file it within such time. A party may file only one such affidavit in any case. It shall be accompanied by a certificate of counsel of record stating that it is made in good faith."

Movant's allegations of bias and prejudice are without merit. There was no showing by means of movant's affidavit or other wise that the trial judge was personally biased or prejudiced within the meaning of 28 U.S.C.§455 (b)(1) or 28 U.S.C. §144. Movant's affidavit states only plaintiff's unfounded conclusions rather than the facts and reasons required by §144. Clearly, the trial judge, as he should, weighed the credibility of the witnesses objective, including plaintiff, and found their testimony lacking in credibility. There is no basis for translating such findings into a conclusion that the trial judge was biased and prejudiced.

Furthermore, it is apparent that, in any event, plaintiff's motion was not timely within the meaning of the statute. Certainly, the statute was not intended to be a vehicle for the use of disgruntled and disappointed litigants seeking new trials.

(2) **Failure to disclose**

Movant argues that the trial judge was in error in failing to disclose "the nature and extent of his relationship to defense counsel."

The statute dealing with disqualification of a judge on the basis of a relationship with an attorney is 28 U.S.C. 455 (b) which provides that the judge shall disqualify himself:

> "(2) Where in private practice he served as lawyer in the matter in controversy, or a lawyer with whom he previously practiced law served during such association as a lawyer concerning the matter, or the judge or such lawyer has been a material witness concerning it;"

In the case in question, defendant's attorney was the father of an associate with the firm of which the trial judge was a member prior to his appointment to the bench. The judge did not serve as a lawyer in the matter in controversy; the attorney was not one with whom the judge previously practiced law; and neither the judge nor the attorney was a material witness. Thus, the provisions of *§455 (b)(2) are not applicable, and there was in fact no significant relationship between the judge and attorney. The assertion in movant's affidavit that "on information and belief a close relationship existed" between defense counsel and the judge means nothing.*

§455 (a) provides:

> "(a) Any justice, judge, magistrate, or referee in bankruptcy of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned."

Movant's affidavit sets forth no facts to support an assertion that the judge's impartiality might reasonably be questioned, and the Court holds that there was in fact no reasonable basis for questioning the trial judge's impartiality. As stated, the judge, with good reason, based his decision largely upon the lack of "credibility of plaintiff and plaintiff's witnesses.

Finally, movant purports to base his motion to recuse upon Canon 3 of the Code of Judicial Conduct. This Court finds nothing in Canon 3 which serves to lift the motion from the classifications of spurious.

New Orleans, Louisiana, this 22nd day of June, 1977.

UNITED STATES DISTRICT JUDGE

APPENDIX C

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 77-3034

CHESTER KAIN,
Plaintiff-Appellees,

v.

S.S. VJAZMA and THE
BALTIC SHIPPING COMPANY,
Defendants-Appellees,

EMPLOYERS NATIONAL INSURANCE CO.,
Intervenor-Appellant.

Appeals from the United States District Court
for the Eastern District of Louisiana

(FEBRUARY 12, 1980)

Before AINSWORTH and HENDERSON, Circuit Judges,
and HUNTER*, District Judge.

PER CURIAM:

Oral argument has been heard in this case and we have carefully considered the briefs, record, findings of fact and conclusions of law. We are in agreement with the decision of Judge Charles Schwartz, Jr. in this matter dated January 24, 1977. We likewise find no merit in the motion to recuse Judge Schwartz filed by plaintiff, and agree with the order of the late Judge R. Blake West dated June 22, 1977 in that regard. We accordingly affirm the decisions below.

AFFIRMED.

United States Court of Appeals
FOR THE FIFTH CIRCUIT

No. 77-3034

D. C. Docket No. CA-74-2823 "A"

CHESTER KAIN,
Plaintiff-Appellant,

versus

S.S. VJAZMA, and THE BALTIC SHIPPING COMPANY,
Defendants-Appellees,

versus

EMPLOYERS NATIONAL INSURANCE CO.,
Intervenor-Appellant.

Appeal from the United States District Court for the Eastern District of Louisiana

Before AINSWORTH and HENDERSON, Circuit Judges and HUNTER*, District Judge.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Eastern District of Louisiana, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed;

It is further ordered that plaintiff-appellant pay to defendants-appellees the costs on appeal to be taxed by the Clerk of this Court.

February 12, 1980

ISSUED AS MANDATE:

*District Judge of the Western District of Louisiana, sitting by designation.

APPENDIX D

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT

OFFICE OF THE CLERK
March 13, 1980

Gilbert F. Ganucheau, Clerk

No. 77-3034

CHESTER KAIN

versus

S.S. VJAZMA

and

THE BALTIC SHIPPING COMPANY

versus

EMPLOYERS NATIONAL INSURANCE CO.

(CA-74-2823 "A")

Dear Counsel:

This is to advise that an order has this day been

entered denying the petition ( ) for rehearing, and no member of the panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 16) the petition ( ) for rehearing en banc has also been denied.

See Rule 41, Federal Rules of Appellate Procedure for issuance and stay of the mandate.

Very Truly yours,

GILBERT F. GANUCHEAU, Clerk

By _____
Deputy Clerk

cc: Mr. Thomas W. Thorne, Jr.,
Ms. Evangeline M. Vavrick
Mr. Wiliam E. Wright
Mr. MacDonald Deming

FILED
JUL 12 1980
MICHAEL RODAK, JR., CLERK

No. 79-1949

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

CHESTER KAIN,

Petitioner,

versus

S.S. VJAZMA

and

THE BALTIC SHIPPING COMPANY,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

MACDONALD DEMING
One State Street Plaza
New York, N.Y. 10004
(212) 344-6800
Attorney for Respondent

WILLIAM E. WRIGHT
Of Counsel

Questions Presented

1. Did the District Court and the Court of Appeals apply the correct standard of law in determining that there was no basis for the trial Judge to recuse himself?

2. Was there any factual basis for the trial Judge to recuse himself?

TABLE OF CONTENTS

PAGE

Questions Presented i

Statutes Involved 1

Statement of the Case 1

Summary of Argument in Opposition to the Petition of Chester Kain for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit 3

REASONS FOR DENYING THE WRIT

POINT I—

There Is Simply No Point of Law Before This Court. The District Court and the Court of Appeals Both Applied the Correct Legal Standards. Petitioner Is Therefore Asking This Court to Find Bias and Prejudice on the Facts of the Case, and to Overrule the Factual Findings of the District Court and the United States Court of Appeals for the Fifth Circuit 4

POINT II—

The Record Contains No Fact or Suggestion of a Fact Which Would Provide a Basis for the Judge to Recuse Himself 7

POINT III—

The Fact That the Trial Judge Questioned the Witnesses on the Stand During the Trial to Test Their Credibility Provides No Grounds for Alleging Bias 10

CONCLUSION 12

Certificate of Service 13

Appendix 1a

Table of Authorities

Cases:

PAGE

Blizard v. *Frechette*, 601 F.2d 1217 (1st Cir. 1979)..... 5

Curl v. *I.B.M.*, 517 F.2d 212 (5th Cir. 1975), *cert. denied*, 425 U.S. 943 (1976) 10

Davis v. *Bd. of School Commissioners*, 517 F.2d 1044 (5th Cir. 1975), *cert. denied*, 425 U.S. 944 (1976)....4, 5, 9

Fredonia Broadcasting Corp., Inc. v. *RCA Corp.*, 569 F.2d 251 (5th Cir. 1978), 439 U.S. 859 (1979).....5, 8, 9

In re J. P. Linahan Inc., 138 F.2d 650 (2d Cir. 1943).... 11

IBM v. *U.S.*, —— F.2d —— (2d Cir. 1980) 10

Parrish v. *Bd. of Commissioners*, 524 F.2d 98 (5th Cir. 1975) (*en banc*), *cert. denied*, 425 U.S. 944 (1976).... 5

Potashnick v. *Port City Construction Company*, 609 F.2d 1101 (5th Cir. 1980) 5, 8

S.J. Groves & Sons v. *Int'l Brotherhood of Teamsters*, 581 F.2d 1241 (7th Cir. 1978) 5

Smith v. *Pepsico*, 434 F. Supp. 524 (S.D. Fla. 1977).... 9

Smith v. *Sikorsky Aircraft*, 420 F. Supp. 661 (C.D. Cal. 1976) 8

U.S. v. *Carignan*, 600 F.2d 762 (9th Cir. 1979)..... 5

U.S. v. *English*, 501 F.2d 1254 (7th Cir. 1974), *cert. denied sub nom., Hubbard* v. *U.S.*, 419 U.S. 1114 (1975) 10

U.S. v. *Grinnell Corp.*, 384 U.S. 563 (1966) 10

U.S. v. *Haldeman*, 559 F.2d 31 (D.C. Cir. 1976), *cert. denied*, 431 U.S. 933 (1977) 5

U.S. ex rel. Weinberger v. *Equifax Inc.*, 557 F.2d 456 (5th Cir. 1977), *cert. denied*, 434 U.S. 1035 (1978).... 5, 8

Statutes:

PAGE

28 U.S.C. 455(a) 3, 4, 5, 6, 10

Miscellaneous:

H.R. Rep. No. 93-1453, 93rd Cong., 1st Sess. 2 (1973), 1974 U.S. Code Cong. & Admin. News p. 6351 ..... 4, 5

Note, *Disqualification of Judges & Justices in the Federal Courts,* 86 Harv. L. Rev. 736 (1973) 5

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

No. 79-1949

CHESTER KAIN,

Petitioner,

versus

S.S. VJAZMA

and

THE BALTIC SHIPPING COMPANY,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

Statutes Involved

Involved in this case is 28 U.S.C. § 455(a), which is printed in the body of Respondent's brief.

Statement of the Case

This suit for injuries to a longshoreman, Chester Kain, during the loading of grain on a vessel, the VJAZMA, posed a single, simple issue of fact: was it a crewmember or was it the winchman of the stevedores in charge of the loading operation who negligently moved a boom causing

a chain (preventor) to swing and push plaintiff into the hold?

The Judge originally scheduled to try this case had two cases ready for trial on the same day, and as is customary under such circumstances, asked another Judge (Charles Schwartz, Jr.) to take one of the cases. (Respondent's Appendix, p. 2a).

The case was tried by consent to the Court without a jury. Plaintiff and three fellow longshoremen, including the winchman, testified in open Court. The Judge found their testimony unworthy of belief, and ruled in favor of defendant shipowner.

Plaintiff's counsel then for the first time accused the trial Judge of bias, and sought a new trial, stating the Judge should have recused himself on the basis that he was biased. The alleged bases on which the argument of bias was premised were:

1. The Judge sharply questioned plaintiff's witnesses during the trial, and

2. The son of defense counsel had been an associate in the Judge's law office while the Judge was in private practice.

District Court Judge Blake West, to whom these issues were referred, aptly termed the motion "spurious," stating succinctly:

> "Movant's affidavit sets forth no facts to support an assertion that the judge's impartiality might reasonably be questioned, and the Court holds that there was in fact no reasonable basis for questioning the trial judge's impartiality. As stated, the judge, with good

> reason, based his decision largely upon the lack of 'credibility of plaintiff and plaintiff's witnesses.' "

(Petition Appendix, p. A-13).

The United States Court of Appeals for the Fifth Circuit heard oral argument, "carefully considered the briefs, records, findings of fact and conclusions of law" and agreed there was no merit in the motion to recuse, and affirmed the decisions below. (Petition Appendix, p. A-14).

Summary of Argument in Opposition to the Petition of Chester Kain for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

Respondent respectfully requests that this Court deny the petition for writ of certiorari to review the judgment entered February 12, 1980 in the United States Court of Appeals for the Fifth Circuit affirming the Order of Judge Blake West dated June 22, 1977, and denying a petition for rehearing entered on March 13, 1980.

There is simply no issue of law before this Court. The District Court and the Court of Appeals both applied the correct legal standards under 28 U.S.C. § 455(a). Petitioner is therefore asking this court to find bias and prejudice on the facts of the case and to overrule the factual findings of the two Courts below.

Even if it were appropriate for this Court to review the findings of the two Courts below, the record contains no fact or suggestion of a fact which would provide a basis for the Judge to recuse himself. Petitioner's attempt to manufacture bias from the fact that the Judge questioned petitioner's witnesses during the trial to test their credibility provides no ground for the appearance of bias.

REASONS FOR DENYING THE WRIT

POINT I

There Is Simply No Point of Law Before This Court. The District Court and the Court of Appeals Both Applied the Correct Legal Standards. Petitioner Is Therefore Asking This Court to Find Bias and Prejudice on the Facts of the Case, and to Overrule the Factual Findings of the District Court and the United States Court of Appeals for the Fifth Circuit.

The statutory standard for disqualification of a Federal Judge is 28 U.S.C. § 455. *Davis* v. *Bd. of School Commissions,* 517 F.2d 1044 (5th Cir. 1975), *cert. denied,* 425 U.S. 944 (1976). Subsection 455(a), which petitioner asserts required Judge Schwartz to recuse himself from the *Kain* case, was amended in 1974 to adopt the language of Canon 3-C of the ABA's Canons of Judicial Conduct. Subsection 455(a) now provides:

> "Any justice, judge, magistrate or referee in bankruptcy of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned."

In discussing the amendment, the House Judiciary Committee commented:

> "Subsection (a) of the amended section 455 contains the general, or catch-all, provision that a judge shall disqualify himself in any proceeding in which 'his impartiality might reasonably be questioned.' This sets up an objective standard rather than the subjective standard set forth in the existing statute. . . . This general standard is designed to promote confidence in

> the impartiality of the judicial process by saying, in effect, if there is a reasonable factual basis for doubting the judge's impartiality, he should disqualify himself . . ."

H.R. Rep. No. 93-1453, 93rd Cong., 1st Sess. 2 (1974), 1974 U.S. Code Cong. & Admin. News pp. 6351, 6355.

Thus, the language of 455(a) regarding impartiality that "might reasonably be questioned," establishes an objective, reasonable factual basis standard by which to insure impartiality. *See* Note, *Disqualification of Judges & Justices in the Federal Courts,* 86 Harv. L. Rev. 736 (1973). Petitioner is therefore correct in asserting that this is the standard Federal Courts have applied. (Petition, p. 13). The Fifth Circuit has consistently applied it. *Potashnick* v. *Port City Construction Company,* 609 F.2d 1101 (5th Cir. 1980); *Fredonia Broadcasting Corp., Inc.* v. *RCA Corp.,* 569 F.2d 251 (5th Cir. 1978), *cert. denied,* 439 U.S. 859 (1979); *U.S. ex rel. Weinberger* v. *Equifax Inc.,* 557 F.2d 456 (5th Cir. 1977), *cert. denied,* 434 U.S. 1035 (1978); *Parrish* v. *Bd. of Commissioners,* 524 F.2d 98 (5th Cir. 1975), (*en banc*), *cert. denied,* 425 U.S. 944 (1976); *Davis* v. *Bd. of School Commissioners,* 517 F.2d 1044 (5th Cir. 1975), *cert. denied,* 425 U.S. 944 (1976). And the other Circuits that have reached the question are in unison. *See, e.g., Blizard* v. *Frechette,* 601 F.2d 1217 (1st Cir. 1979); *U.S.* v. *Carignan,* 600 F.2d 762 (9th Cir. 1979); *S.J. Groves & Sons* v. *Int'l Brotherhood of Teamsters,* 581 F.2d 1241 (7th Cir. 1978); *U.S.* v. *Haldeman,* 559 F.2d 31 (D.C. Cir. 1976), *cert. denied,* 431 U.S. 933 (1977).

Petitioner fails to recognize however, it is precisely this reasonable basis standard that both the United States District Court for the Eastern District of Louisiana and the United States Court of Appeals for the Fifth Circuit

applied in the *Kain* case. The language of Judge West's Order denying petitioner's motion for recusal is the very language of 455(a) that established the reasonableness standard. In dismissing petitioner's 455(a) claim Judge West said:

> "Movant's affidavit sets forth no facts to support an assertion that the judge's impartiality *might reasonably be questioned,* and the Court held that there was in fact *no reasonable basis* for questioning the trial judge's impartiality."

(Petition Appendix, p. A-13) (emphasis added). The Fifth Circuit, in their affirmance, specifically agreed with Judge West's Order. (Petition Appendix, p. A-14).

There is therefore simply no point of law before this Court. The lower Court's decision in the *Kain* case applied subsection 455(a) in accordance with other decisions of the Fifth Circuit and additional Circuits. In asking this Court to grant certiorari, the petitioner, in effect, is asking the Court to find bias and prejudice on the facts of the case, overruling the factual findings of Judge West and the Fifth Circuit's affirmance of those findings.

POINT II

The Record Contains No Fact or Suggestion of a Fact Which Would Provide a Basis for the Judge to Recuse Himself.

Not only is no question of law presented by this case, but also both the United States District Court for the Eastern District of Louisiana and the United States Court of Appeals for the Fifth Circuit properly applied the facts of this case to the correct standard of law, for the facts present a less meritorious claim for bias and prejudice than other cases that have denied such a claim.

Petitioner's primary assertion to justify recusal is that Judge Schwartz, prior to his appointment to the bench, had been a partner in the firm of which William E. Wright, Jr., the son of defense attorney William E. Wright, had been an associate. (Petition, pp. 5-7). Petitioner suggests that this situation gave rise to a bias for Mr. Wright and thus for his client, and denied petitioner an impartial trial. But as Judge Schwartz himself stated:

> "I hired Mr. William E. Wright, Jr. without having to ever consult or having a conversation with Mr. William Wright, Sr. I have never had a social engagement, a social relationship, or any kind of relationship with Mr. William Wright, Sr. during the entire time that I have practiced law. I think I am correct, I don't know if he was in my law class, but we were in law school at the same time. I have never had a case in which I have been associated with Mr. William Wright, Sr., nor do I ever recall having a case in contest with Mr. Wright, Sr. in some thirty years before this Bar. So, as to the allegations and the reference that there may have been some rela-

> tionship between Mr. William Wright, Sr. and this Court they are utterly false and without merit."
>
> (Respondent's Appendix, pp. 2a-3a)

A review of the cases holding for recusal shows that the facts in the present case clearly do not present the type of relationship between an attorney and Judge that has been found to give rise to bias and prejudice.

Judge Schwartz's relationship with Mr. Wright, Sr. or his law firm was not one of attorney-client. *Smith* v. *Sikorsky Aircraft,* 420 F. Supp. 661 (C.D. Cal. 1976) (plaintiff's law firm was associated with an attorney who had acted as counsel for the Judge). Nor did Judge Schwartz have any business dealings with Mr. Wright, Sr. or with any member of his firm. *Potashnik* v. *Port City Construction Co.,* 669 F.2d 1101 (5th Cir. 1980) (attorney for one party and Judge joint investors in real estate). Nor did Judge Schwartz or any member of his family or of his former law firm have even the possibility of a pecuniary interest in this case. *Id.* (Judge's father partner in law firm representing a party; father held to have potential to be financially affected by the outcome of case).

Finally, Mr. Wright was not Judge Schwartz's former law clerk, and he did not previously work on the case in that capacity. *Fredonia Broadcasting Corp., Inc.* v. *RCA Corp.,* 569 F.2d 251 (5th Cir. 1978), *cert. denied,* 439 U.S. 859 (1979). (Judge's former law clerk actively participated as plaintiff's counsel's associate for retrial of case he worked on as clerk).

More importantly, the facts of *Kain* present a lesser potential for the appearance of bias than attorney-Judge relationships that the Fifth Circuit has held do not justify recusal. In *United States ex rel. Weinberger* v. *Equifax Inc.,* 557 F.2d 456 (5th Cir. 1977), *cert. denied,* 434 U.S.

1035 (1978), a District Court Judge's son was an associate of the law firm representing the defendant, and the Court decided against disqualification. Certainly the fact that the Judge's son worked in the firm of defendant's counsel presents a greater potential for bias towards that defendant than the facts do in the case at hand, where there was no relative of Judge Schwartz with the law firm of defendant's counsel.

In *Smith* v. *Pepsico,* 434 F. Supp. 524 (S.D. Fla. 1977), the Court held that the fact that the plaintiff's attorney was a law clerk for a Judge for two years was not a basis on which to question the Judge's impartiality. (attorney had no involvement with case while clerk). Certainly the close relationship between a Judge and law clerk, *see Fredonia Broadcasting Corp., Inc.* v. *RCA Corp.,* 569 F.2d 551 (5th Cir. 1978), *cert. denied,* 439 U.S. 1035 (1979), suggests a greater potential for bias towards a party that clerk may represent than does the relationship between a Judge and the father of an associate in the Judge's former law firm.

Thus, the trial Court did not abuse its discretion in evaluating the evidence presented and the Fifth Circuit correctly so held. *See, Davis* v. *Bd. of School Commissioners,* 517 F.2d 1044 (5th Cir. 1975), *cert. denied,* 425 U.S. 944 (1976) (review limited to determining whether trial Court's evaluation of evidence amounted to abuse of discretion).

POINT III

The Fact That the Trial Judge Questioned the Witnesses on the Stand During the Trial to Test Their Credibility Provides No Grounds for Alleging Bias.

Both the United States District Court for the Eastern District of Louisiana and the United States Court of Appeals for the Fifth Circuit properly ruled that a trial Judge's objective findings that witnesses lacked credibility affords no basis for the conclusion such a Judge was biased and prejudiced.

As a supplementary reason for certiorari, petitioner asserts that Judge Schwartz's trial demeanor denied petitioner an impartial trial. (Petition, p. 14). In particular, petitioner contends that Judge Schwartz "participated extensively in cross-examination and conducted himself in a manner . . . which gave a strong appearance of bias . . ." (Petition, p. 5).

This Court has held that alleged bias and prejudice, claimed to disqualify a Judge, must stem from an extrajudicial source. *U.S.* v. *Grinnell Corp.*, 384 U.S. 563 (1966). And rulings and findings made by a Judge in the course of a judicial proceeding do not justify a finding that the Judge has a personal bias or prejudice for or against a party. *Curl* v. *I.B.M.*, 517 F.2d 212 (5th Cir. 1975), *cert. denied*, 425 U.S. 943 (1976). *See U.S.* v. *English*, 501 F.2d 1254 (7th Cir. 1974), *cert. denied, Hubbard* v. *U.S.*, 419 U.S. 1114 (1975).

As recently as this February, the United States Court of Appeals for the Second Circuit was presented with a claim that adverse rulings and a Judge's treatment of a party's witnesses can create an appearance of bias under subsection 455(a). *IBM* v. *U.S.*, —— F.2d —— (2d Cir. 1980). The

Court rejected this contention. Regarding adverse rulings the Court said that "a trial Judge must be free to make rulings on the merits without the apprehension that if he makes a disproportionate number in favor of one litigant, he may have created the impression of bias." As to conduct toward witnesses, the Court held that when a Judge acts as fact-finder, it is his duty to form judgments as to witnesses' veracity. The role of Judge as fact-finder, the Court said, was succinctly stated by Judge Frank in *In re J. P. Linahan Inc.*, 138 F.2d 650 (2d Cir. 1943):

> ". . . because his fact-finding is based on his estimates of the witnesses, of their reliability as reporters of what they saw and heard, it is his duty, while listening to and watching them, to form attitudes towards them. He must do his best to ascertain their motives, their biases, their dominating passions and interests, for only so can he judge of the accuracy of their narrations. He must also shrewdly observe the stratagems of the opposing lawyers, perceive their efforts to sway him by appeals to his predilections. He must cannily penetrate through the surface of their remarks to their real purposes and motives. He has an official obligation to become prejudiced in that sense. Impartiality is not gullibility. Disinterestedness does not make child-like innocence. If the judge did not form judgments of the actors in those courthouse dramas called trials, he could never render decisions."

CONCLUSION

The Court below correctly applied the proper legal standards, and correctly determined on the facts that there was no bias, or appearance of bias which could justify asking the Judge to recuse himself.

The petition should be denied.

Respectfully submitted,

MacDonald Deming
One State Street Plaza
New York, New York 10004
Attorney for Respondent

William E. Wright
Of Counsel

Certificate of Service

Undersigned counsel for Respondent certifies that on this eleventh day of July, 1980, three (3) copies of this Brief in Opposition of a Petition for Writ of Certiorari were deposited in a United States Post Office with First-Class Postage prepaid in accordance with the Rules of this Court addressed to Evangeline M. Vavrick, counsel for Petitioner, Chester Kain at her post office address:

Evangeline M. Vavrick
Suite 200—Nance Building
526 St. Louis Street
New Orleans, Louisiana 70130

I certify that by such service all parties required to be served have been served.

MacDonald Deming
One State Street Plaza
New York, New York 10004
Attorney for Respondent

July 11, 1980

Appendix

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF LOUISIANA

No. 74-2823

SECTION "F"

CHESTER KAIN

VS.

S/S VJAZMA
THE BALTIC SHIPPING CO.

Transcript of Motion heard in open court on September 7, 1977, before the HONORABLE CHARLES SCHWARTZ, JR., District Judge presiding.

APPEARANCES:

EVANGELINE M. VAVRICK
500 Natchez Street, Suite 200
New Orleans, Louisiana
Attorney for Plaintiff

LEMLE, HELLEHER, MOHIMEYER & MATTHEWS
By: Terrence C. Forstall, Esq.
1800 First National Bank of Commerce Building
New Orleans, Louisiana
Attorneys for Intervener

TERRIBERRY, CARROLL, YANCEY & FARRELL
By: William E. Wright, Esq.
2141 International Trade Mart Building
New Orleans, Louisiana
Attorneys for Defendants

REPORTED BY:

Julianne W. Andressen, C.S.R., R.P.R.
Official Court Reporter
Section "A"
United States District Court

* * * *

Since your allegations are still before me in connection with the Motion for a New Trial, and this refers not to the Intervener's allegations but to Plaintiff's allegations, I note that in her motion Plaintiff states that the case was not tried by—in her allegations refer to the fact that the case was not tried by a jury; has stated this Court quote "volunteered to try this case." Whether or not anything more is to be connotated by the use of the word volunteer or not the Court has no way of knowing. However, the facts are as follows:

This Judge and Judge Mitchell and other Judges were having lunch, at which time Judge Mitchell asked if anyone had some time available, as he was in a jam with two cases ready to be tried on the same day. He wanted another Judge to try a collision case involving Russian seamen, and explained that a great deal of the testimony would have to be accomplished through an interpreter. As is the custom in this Court when a Judge is not engaged in trial and another Judge has two cases that are ready for trial on the same day, in the interest of judicial time tries a case for another Judge. This is how this matter was tried before this Court.

* * * *

Insofar as the allegations are in the record concerning my relationship with Mr. William E. Wright, Jr., who is the son of Mr. William E. Wright, Sr., Mr. William E.

Wright, Jr. was an associate in my law firm. I hired Mr. William E. Wright, Jr. without having to ever consult or having a conversation with Mr. William Wright, Sr. I have never had a social engagement, a social relationship, or any kind of relationship with Mr. William Wright, Sr. during the entire time that I have practiced law. I think I am correct, I don't know if he was in my law class, but we were in law school at the same time. I have never had a case in which I have been associated with Mr. William Wright, Sr., nor do I ever recall having a case in contest with Mr. Wright, Sr. in some thirty years before this Bar. So, as to the allegations and the reference that there may have been some relationship between Mr. William Wright, Sr. and this Court they are utterly false and without merit.

• • • •